Supreme Court, U.S.
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No. 03-1136

In The Supreme Court of the United States

MICHAEL SLUSARCHUK, and ELAINE STEBLETON, individually and as trustee on behalf of the heirs and next of kin of Jennifer Stebleton, deceased,

Petitioners,

v.

JON HOFF, individually and in his official capacity as Minneapolis Police Officer, LANCE FAUST, individually and in his official capacity as Minneapolis Police Officer,

Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether police officers who without legal justification engage a law-abiding individual in a high-speed pursuit unrelated to the "legitimate object of arrest" act with an "intent to harm or worsen the legal plight" of said individual, and whether said police officers are afforded qualified immunity from Fourteenth Amendment claims of innocent third parties harmed in relation to said high-speed pursuit?

2. Whether public policy mandates that innocent third parties be protected from the wrongful conduct of police officers who arbitrarily engage in abuse of power by initiating the unlawful high-speed pursuit of law abiding citizens in a manner unrelated to the "legitimate object of arrest," and whether such conduct "shocks the conscious" and is subject to application of the "deliberate indifference" standard rather than the "intent to harm/worsen legal plight" standard established in County of Sacramento v. Lewis, 523 U.S. 833 (1998)?

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OPINION BELOW

The decision of the Eighth Circuit Court of Appeals was published and is reported at 346 F.3d 1178 (8th Cir. 2003). The District Court decision is published and is reported at 228 F.Supp.2d 1007 (D.Minn. 2002). For the Court's reference, the pertinent rulings of the Eighth Circuit and District Courts are reprinted in the Appendix at 1-26.

JURISDICTION

The Eighth Circuit filed its decision on October 22, 2003. This Court has jurisdiction relative to this matter under 28 U.S.C. § 1254(1) to review the Eighth Circuit's decision on a writ of certiorari.

STATUTORY PROVISION INVOLVED

Fourteenth Amendment to the United States Constitution, Section 1

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

I. Hoff and Faust's Initial Encounter With Rico Howard.

On August 22, 2000, at approximately 11:30 p.m., John Hoff ("Hoff") and Lance Faust ("Faust") were on routine patrol in a marked squad car traveling east on 44th Street South in Minneapolis. (A-299, 300, 302-04).[1] As they approached 4th Avenue South, Hoff and Faust observed a

[1] As Respondents included in their appendix to their 8th Circuit Appellate Brief all of Petitioners' exhibits, Petitioners did not provide a separate appendix to the 8th Circuit Court and all exhibit references herein are to the Separate Appendix of Respondents.

black Mitsubishi stopped legally on 4th Avenue facing south. (A-302-03). Hoff stopped at the four-way stop sign at the intersection of 44th and 4th. (A-304). The Mitsubishi did not move, foregoing its right-of-way to the police officers. (A-307-08).

Hoff and Faust turned left onto 4th Avenue and drove past the Mitsubishi. (A-305). Hoff shined the squad car's alley light into the Mitsubishi to investigate the driver, thereupon learning that the Mitsubishi was occupied by one individual – a "black male". (A-299, 300, 305). While driving past the car, upon seeing the black male in the light, Faust claims to have immediately recognized the black individual as Rico Howard. (A-299, 300).

After Hoff and Faust passed the Mitsubishi and turned onto 4th Avenue, Hoff and Faust claim to have discussed their recollection that an outstanding probable cause pickup ("PC pickup") existed on an individual named "Howard." (A-299, 300). Hoff and Faust admit that neither of them possessed any knowledge of the PC pickup, including any physical description or personal information regarding the suspect, other than the single fact that the individual identified bore the last name "Howard." (A-318, 319). While Hoff did not know or recognize Rico Howard, Faust claimed to recognize and know Rico Howard, and stated: "We both remembered there was a pickup, a PC pickup, that we were shown in roll call on a Howard." (A-319). In response under oath to a question regarding whether he only remembered the last name of the individual in the PC pickup, Faust responded affirmatively by stating: "Just remembered the name Howard." (A-319). Hoff also admits under oath that he recalled only the name "Howard" from the PC pickup. (A-306, 318).

II. Hoff and Faust's Unjustified Decision to Stop Rico Howard.

After allegedly discussing their recollection of a "Howard" PC pickup, Hoff testifies that he told Faust "you know, I'm going to go pull this guy over." (A-308). Faust denies any such statement by Hoff, testifying instead that there was no verbal communication by either officer of a determination to make a stop. (A-239, 320-21). Faust claims that "we didn't verbalize and say, we're going to stop him." (A-331). In their respective police reports, however, both Hoff and Faust identify the sole basis for their decision to make a stop was the fact that Faust recognized Rico Howard and both officers were aware of a PC pickup applying to some individual named "Howard". (A-299, 300).

Through inexplicable conduct defying their claimed belief that Rico Howard might be subject to a PC pickup, and despite contrary to their claim they had decided to initiate an investigatory stop, after passing Rico Howard's legally stopped vehicle Hoff and Faust did not take any action to stop or even maintain visual contact with Mr. Howard. (A-299, 300, 308). As Hoff and Faust continued to drive away from the Mitsubishi, Rico Howard's car turned left (eastbound) on 44th Street and Hoff claims to have watched as Mr. Howard drove off in a different direction. (A-300).

In response to Rico Howard's driving away, Hoff and Faust did not make a quick U-turn in order to follow him, but instead continued slowly north on 4th Avenue - taking them in a different direction and farther away from, and out of sight of, Rico Howard. (A-237-39, 308). Ultimately, after they had lost visual contact with Rico Howard, Hoff and Faust turned right (eastbound) onto 43rd Street. (A-299, 300, 308-09).

Rico Howard did not continue east along 44th Street past 5th Avenue. (A-309, 320). He did not turn south onto 5th Avenue. (A-309, 320). Innocently and un-evasively he turned north onto 5th Avenue - the same direction he had seen taken by Hoff and Faust. (A-309, 320). By pure chance, Hoff and Faust once again encountered the vehicle driven by Mr. Howard – this time at the corner of 43rd Street and 5th Avenue. (A-308).

While Hoff and Faust were stopped at the intersection, Mr. Howard's vehicle proceeded north on 5th Avenue after first legally stopping at the stop sign at 43rd and 5th. (A-309). Hoff and Faust observed no suspicious activity at this intersection, but only recognized the same Mitsubishi and driver they had previously passed and watched drive out of sight. (A-309, 330-31). Hoff and Faust turned left, heading northbound onto 5th Avenue approaching 42nd Street, following Mr. Howard. (A-309-10). Hoff and Faust indicate no activity by Mr. Howard that would have corroborated any alleged suspicions as they re-encountered Mr. Howard at the intersection of 43rd and 5th. (A-309, 330-31).

III. Hoff and Faust's Initiation of Unjustified Stop and Subsequent Pursuit.

Despite abundant time to contemplate their actions in a non-emergency setting, and without any "particularized and objective basis," Hoff activated the emergency lights of the squad car shortly before reaching 42nd Street on 5th Avenue in order to initiate a stop of Rico Howard. (A-310). By initiating the stop, Hoff and Faust acted in deliberate disregard to the substantive due process rights of both Mr. Howard and the public in light of the unjustified nature of the stop and the very real, foreseeable possibility that the

illegitimate pursuit of Rico Howard, whom Faust knew to have a criminal background, may escalate.

Mr. Howard did not stop and instead turned left (westbound) from 5th Avenue onto 42nd Street. (A-310). After Mr. Howard did not immediately stop, but continued driving legally within the speed limit, Hoff did not call off his wrongful attempted stop, but instead initiated and continued to engage in the unjustified vehicular pursuit of Mr. Howard. (A-310). Ultimately, rather than calling of the pursuit, Hoff activated the emergency siren of the squad car - again escalating the pursuit and in deliberate disregard to the federally protected civil rights of others. (A-310). While continuing to benefit from the opportunity to reconsider their conduct in a slow-speed pursuit at or below posted speed limits, Hoff and Faust continued the pursuit through residential Minneapolis while Mr. Howard continued to refuse to stop his vehicle – proceeding west on 42nd Street and approaching 4th Avenue. (A-311).

Hoff and Faust continued their refusal to call off the wrongful pursuit – even while the two cars began to accelerate to high speeds. (A-312-313). Despite their ongoing opportunity to consider and deliberate upon their actions, Faust and Hoff continued their dangerous pursuit of Mr. Howard through the dark, vehicle-lined residential streets of a south Minneapolis neighborhood. (A-336-38). Hoff and Faust increased the speed of their automobile to match that of Howard's in a blind effort to fulfill their quest to harass and apprehend an individual whom they encountered only minutes before sitting quietly in his car and engaging in no illegal activity. (A-336-38).

Hoff and Faust defiantly refused to terminate their illegitimate pursuit in defiance of, and in deliberate disregard for, their own department's operational policies and for the

federally protected civil rights of others - continuing to chase Mr. Howard with their emergency lights and sirens activated, turning left (southbound) onto 3rd Avenue without stopping. (A-324, 327-28, 356-60). The chase continued along the long blocks of 3rd Avenue. (A-324, 336). Although it was clear to Hoff and Faust that Rico Howard would not voluntarily stop, and although Hoff and Faust were unnecessarily exposing the public to extreme risk, at no time did Hoff and Faust voluntarily terminate their pursuit. (A-327-28).

IV. The Resulting Unnecessary and Senseless Death of Jennifer Stebleton and Paraplegia of Michael Slusarchuk.

Hoff and Faust continued to chase Rico Howard at a dangerously high speed toward the intersection of 46th Street and 3rd Avenue. (A-336-37). Unaware of the high-speed chase, Slusarchuk and Jennifer Stebleton also approached the intersection of 46th Street and 3rd Avenue – on their way to Jennifer's nearby home after renting a video they intended to watch together. (A-269). As Hoff and Faust had witnessed when Rico Howard came to previous intersections during the pursuit, Rico Howard predictably, and without slowing, drove through the stop sign at the intersection of 46th Street and 3rd Avenue - a busy intersection only a block from the on and off ramps to Interstate 35W. (A-313, 324-25).

Tragically, at the precise moment Hoff and Faust chased Rico Howard through the intersection, and while Michael and Jennifer were chatting and enjoying their evening together, Jennifer's car (which had the right-of-way) passed through the intersection and into the path of the high-speed chase - the pursued Mitsubishi smashing into broad-side of the Lexus. (A-313, 324-25). Jennifer was killed instantly by the extreme impact, and was pronounced dead at

the scene of the crash. (A-339-40). Michael lay trapped in the vehicle next to Jenni, paralyzed and unable to help his friend. (A-339-40).

Michael remained in critical condition and comatose for weeks following the collision, nearly dying on several different occasions and enduring numerous surgeries in an attempt to repair his spine, heart, numerous broken bones, and other injuries. (A-270). Michael is permanently paralyzed as a result of the collision and will require a wheelchair for the remainder of his life. (A-270).

Crash reconstruction was done by Sgt. John Dennig ("Dennig"), Minnesota State Patrol. (A-341-44). Dennig determined that the brakes of the Mitsubishi being pursued by Hoff and Faust were not applied prior to the collision and that the car was traveling an estimated 68-76 mph immediately prior to crashing into Jennifer's vehicle. (A-341-44). Dennig determined that Jenni and Michael were traveling 24-26 mph at the time of the collision and that they were in no manner at fault relative to the crash. [2] (A-341-44).

V. Hoff and Faust Conspire to Avoid the Consequences of Their Wrongful Conduct.

Shortly after the wrongful initiation and continuation of the pursuit of Rico Howard resulted in the crash, Hoff and Faust had ample opportunity to speak with each other and get their stories straight regarding the pursuit and the resulting accident prior to filing their respective reports after 2:00 am later that night. (A-299, 300). Following their discussion, a conversation during which Slusarchuk and Stebleton allege that Hoff and Faust furthered their conspiracy with one

[2] Unfortunately for Slusarchuk and the heirs of Jennifer Stebleton, the automobile driven by Rico Howard was not insured, contrary to the requirements of the Minnesota No-Fault Act.

another to deny the federally-protected civil rights of Petitioners, Hoff and Faust filed false police reports relative to the accident which misrepresented both the basis for the stop and the facts regarding their speed and conduct during the chase. (A-299, 300).

Pursuant to the reports of Faust and Hoff, which reports appear to mirror each other through use of almost identical language and structure to ensure that their stories were consistent, the two officers both claim that they remembered that there was a PC pickup relating to a "Howard". (A-299, 300). Hoff additionally claimed in his report that he remembered that the pickup was for an "aggravated assault." (A-300). At the subsequent Rasmussen Hearing, however, Hoff testified that the only thing he had remembered about the PC pickup bulletin was the last name "Howard." (A-318).

While Faust and Hoff admit they had no idea whether the PC Pickup applied to Rico Howard, their claim that he believed the PC pickup might apply to Rico Howard defies reason. (A-319). While Faust claims he remembered the PC pickup because it was supposedly provided to him at roll call on the morning of the accident, the PC pickup bulletin was actually distributed one month earlier on July 25, 2000. (A-215-16, 335). When Faust allegedly saw the Arrest Bulletin the morning at issue, one must believe that he identified only the last name "Howard" while ignoring the name "LaRon Lee" that immediately followed. (A-335). One must also believe that Faust ignored the large, clear photos of 23 year-old LaRon Lee Howard, which would have obviously later precluded in Faust's mind the possibility that the PC pickup may apply to 46 year-old Rico Howard – a man whom Faust claims to know well and who is half LaRon Lee Howard's age. (A-47, 335).

The only similarities between LaRon Howard and Rico Howard are that they are both black and that they both share the last name "Howard." (A-335). Aside from the color of the two individuals' skin and their last names, the two "Howards" are dissimilar in every way imaginable. (A-335). Faust's claim that he "immediately recognized" Rico Howard that evening and at the same time believed the "Howard" PC pickup he claimed to have seen that morning may apply to the same man defies reason. In the same manner it defies reason to believe that Hoff and Faust relied upon a simple coincidence of names as sufficient basis to justify the stop and high-speed pursuit of Rico Howard. (A-319, 329).

Taking the opportunity to document the incident through reports relating their pursuit of Mr. Howard, both officers asserted that they did not pursue Mr. Howard at a high rate of speed. In fact, Hoff and Faust claim at no time did they exceed posted speed limits – going so far as to say that their pursuit of Mr. Howard for several blocks, while their patrol car lights were flashing and siren was blaring, remained at slow speeds within 15-20 miles per hour. (A-299, 300, 312, 314, 3323-25). Faust and Hoff further represent that Mr. Howard's car did not begin to accelerate above posted speeds until it approached the 4500 block of 3rd Avenue – no earlier than the mid-point of the 4400 block. (A-299, 300, 324).

While sitting on the front porch of his house after returning from work on the night of the incidents at issue, Minneapolis resident Tulua Nuuvali, who lived at the beginning of the 4400 block of 3rd Avenue, saw the Mitsubishi driven by Rico Howard and the squad car pass by his house at high rates of speed. (A-336-38). Through affidavit and a statement to police, Mr. Nuuvali estimates both cars were traveling at minimum speeds of 50-60 miles per hour. (A-336-38, 346-47). According to Mr. Nuuvali,

the police car was following as close as only 20 feet behind the Mitsubishi. (A-337, 347).

VII. Minnesota Federal District Court Holds Respondents Not Entitled to Qualified Immunity.

Slusarchuk and Jennifer Stebleton's estate filed suit against Hoff and Faust asserting, among other claims, that Hoff and Faust's actions violated Slusarchuk's and Jennifer Stebleton's Fourteenth Amendment substantive due process rights under 42 U.S.C. § 1983. Hoff and Faust immediately pursued a motion for summary judgment based in part on qualified immunity which was denied by Judge Michael J. Davis of the U.S. District Court for the District of Minnesota as to Petitioners' substantive due process and conspiracy claims in a decision reported at 228 F.Supp.2d 1007 (D. Minn. 2002).

In finding that Respondents were 'not entitled to qualified immunity from responsibility for the damage caused by their conduct, the Minnesota District Court held:

> The Due Process Clause was intended to prevent government officials from abusing their power or employing it as an instrument of oppression. See County of Sacramento v. Lewis, 523 U.S. 833, 840, 845-6, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (citations omitted). ... '[H]igh speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983.' Lewis, 523 U.S. at 854, 118 S.Ct. 1708. '[O]nly a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the

element of arbitrary conduct shocking to the conscience, necessary for a due process violation.' Id. at 836, 118 S.Ct. 1708. ...

When officers encountered Rico Howard, he was stopped legally at a stop sign. This is where the Court's analysis begins. Unlike the "suspected offenders" in Lewis and Helseth, Rico Howard was not already traveling at high rates of speed or otherwise engaged in unlawful conduct to prompt a response, and the officers were not faced with a "course of lawless behavior" that required police action. Yet, from the moment officers saw him stopped legally at the stop sign to the pursuit that followed, Rico Howard's legal plight worsened. A reasonable jury could conclude that the officers' initial decision to stop a law-abiding Rico Howard amounts to the type of conduct to which the Supreme Court referred when recognizing that a § 1983 action is redressible in situations where an officer intends to worsen a suspect's legal plight. See Lewis, 523 U.S. at 854 & n. 13, 118 S.Ct. 1708 (discussing Checki v. Webb, 785 F.2d 534 (5th Cir.1986)). Indeed, such conduct would amount to the type of arbitrary government action the Fourteenth Amendment protects against.

App. 13-16.

Hoff and Faust appealed the District Court's partial denial of their summary judgment motion. In its opinion filed October 22, 2003, the Eighth Circuit Court of Appeals overturned the District Court ruling and held that

Respondents were entitled to qualified immunity. In overruling the District Court's determination that a reasonable jury could conclude that the officers acted with a wrongful intent to "worsen legal plight," Judge Lokan stated:

> The Court added this term the second time it stated its intent-to-harm holding in Lewis. Compare 523 U.S. at 836, 118 S.Ct. 1708, with 523 U.S. at 854, 118 S.Ct. 1708. The Court did not further explain what it meant by an intent to worsen legal plight, but the sentence was followed by footnote 13, which discussed a prior Fifth Circuit case involving alleged "intentional misuse" of a police officer's vehicle to terrorize a citizen. Checki v. Webb, 785 F.2d 534, 538 (5th Cir.1986). ... [W]e construe the term as applying only to a narrow category of pursuits that reflect a conscience-shocking motive beyond the realm of legitimate government action but do not involve an intent to inflict physical harm.

App. 24-25.

REASONS FOR GRANTING THE PETITION

I. This Court Should Resolve the Split Among the Circuits with Regard to the Application of the "Intent to Harm/Worsen Legal Plight" Standard and With Regard to Whether Police Officers Are Afforded Qualified Immunity From Responsibility for Their Wrongful Conduct in Initiating High Speed Pursuits Which are Not Related to the "Legitimate Object of Arrest."

The United States Supreme Court has held fast to the principal that that a substantive due process cause of action exists relative to executive abuse of power which "shocks the conscience." In County of Sacramento v. Lewis, 523 U.S. 833 (1998), the Court acknowledged the applicability of the "deliberate indifference" standard in evaluating behavior relative to substantive due process claims, but specifically identified a more stringent standard relative to those high-speed police pursuits which are initiated in relation to the "legitimate object of arrest." In Lewis, the Court held that where police officers initiate a high-speed pursuit in relation to the legitimate object of arrest, their conduct "shocks the conscience" when officers act with the intent to "cause harm" or "worsen legal plight".

In the instant case, Hoff and Faust engaged in an abuse of executive power without a legitimate law enforcement objective by attempting to stop Rico Howard simply because his last name matched that of the subject of a probable cause pickup the officers allegedly recall seeing – Laron Lee Howard. Faust and Hoff's arbitrary abuse of power by attempting to stop and apprehend Rico Howard simply because they recalled a PC pickup on a "Howard" "shocks the conscience" and serves no legitimate law enforcement objective.

While Faust and Hoff are not entitled qualified immunity due to their efforts to worsen the legal plight of Rico Howard, the chase they initiated was not in furtherance of the "legitimate object of arrest." Consequently, the "deliberate indifference" standard is appropriate in evaluating the officers' arbitrary abuse of power. Hoff and Faust acted with deliberate indifference to the rights of others when they unjustifiably chased Rico Howard through the residential streets of Minneapolis. As a result, Hoff and Faust are not entitled to qualified immunity relative to Petitioners' substantive due process and conspiracy claims.

The Eight Circuit's decision to limit the scope of the "cause harm or worsen legal plight" language of the Lewis Court is contrary to the societal interests articulated in Lewis. Societal interests mandate that officers who engage in wrongfully motivated and illegitimate efforts to arrest individuals should not, as a matter of public policy, be allowed to utilize qualified immunity as a shield to protect themselves from responsibility for their wrongful conduct and the damage caused thereby.

The extent to which United States citizens are prohibited from challenging wrongful police conduct is a vitally important issue that warrants further consideration by the United States Supreme Court. Furthermore, Petitioners respectfully assert that a writ of certiorari should be granted in order to redress the Eighth Circuit's improper application of "intent to harm/worsen legal plight" language of the Lewis Court and to clarify the meaning of the "intent to harm/worsen legal plight" doctrine. Finally, the Petition for Writ of Certiorari should be granted in order to resolve the conflict existing among Federal Circuits with regard to the application of the "worsen legal plight" doctrine –

particularly the conflict between the 5th Circuit and 8th Circuit as exhibited in Checki and the instant matter respectively.

As established by the facts identified herein, Hoff and Faust wrongly and without justification attempted to stop and detain an African-American male whom they had identified as Rico Howard – an individual who had committed no legal wrong and had engaged in no activity justifying arrest. As a foreseeable result of Hoff's and Faust's wrongful, unjustified, and premeditated conduct in attempting to stop Rico Howard, and in ultimately engaging Mr. Howard in both a low-speed and high-speed vehicular pursuit through a residential Minneapolis neighborhood, both Hoff and Faust deliberately disregarded the constitutional substantive due process rights of the innocent public.

A. Slusarchuk and Stebleton have properly alleged violations of a Constitutional right to substantive due process.

To prevail on a claim under 42 U.S.C. § 1983, Slusarchuk and Stebleton must prove that the conduct of Officers Hoff and Faust deprived them of a privilege, right or immunity under guaranteed by either the United States Constitution or other United States law. Collins v. City of Harker Heights, TX, 503 U.S. 115, 120 (1992). The Due Process Clause of the Fourteenth Amendment to the United States Constitution mandates that no state actor may deprive any person of life, liberty, or property without due process of law. U.S. Const., Art. 14, §1. Included within this mandate is a right to "substantive" due process, "barring certain government actions regardless of the fairness of the procedures used to implement them." Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct., at 665 (1986); see also Zinermon v. Burch, 494 U.S. 113, 125, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990) (noting that substantive due process

violations are actionable under §1983). As Hoff and Faust candidly acknowledge, qualified immunity "does not protect 'the plainly incompetent or those who knowingly violate the law.'" (A-134) (citing Ludwig v. Anderson, 54 F.3d 465, 470 (8th Cir.1995) (quoting Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039 (1987)); Mettler v. Whitledge, 165 F.3d 1197, 1202-3 (8th Cir.1999)).

The Due Process Clause operates as a barrier to arbitrary abuses of governmental authority, intended to prevent government officials "from abusing [their] power, or employing it as an instrument of oppression." Collins, 503 U.S. at 126-27 (quoting DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189, 196, 109 S.Ct. 998, 1003), in turn quoting Davidson v. Cannon, 474 U.S. 344, 348, 106 S.Ct. 668, 670-671 (1986)); see also County of Sacramento v. Lewis, 523 U.S. 833, 856, 118 S.C. 1708, 1722 (1998) (Concurrence of Justices Kennedy and O'Connor) (stating that where it is demonstrated that the actions of the State were part of a causal chain resulting in loss of life, liberty, or property there exists an interest sufficient to invoke due process).

In defining the intent and purpose underlying the concept of due process, the Supreme Court has "understood the core of the concept to be protection against arbitrary action." Lewis, 523 U.S. at 845, 118 S.Ct. at 1716. The Court has found that the principle of substantive due process was "intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice." Hurtado v. California, 110 U.S. 516, 527, 4 S.Ct., at 117 (1884) (emphasis added) (citing Bank of Columbia v. Okely, 17 U.S. 235, 4 Wheat. 235-244, 4 L.Ed. 559 (1819)). Even in the service of a legitimate governmental objective, the exercise of power without any reasonable justification

constitutes a violation of an individual's Fourteenth Amendment Rights. Daniels, 474 U.S. at 331, 106 S.Ct. at 664 (the substantive due process guarantee protects against government power arbitrarily and oppressively exercised); Lewis, 523 U.S. at 845, 118 S.C. at 1716.

The United States Supreme Court has defined abuse of power which is arbitrarily and oppressively exercised in the constitutional sense as that which "shocks the conscience" or interferes with rights "implicit in the concept of ordered liberty." Rochin v. California, 342 U.S. 165, 172, 72 S.Ct. 205, 209-10 (1952); United States v. Salerno, 481 U.S. 739, 746, 107 S.Ct. 2095, 2101 (1987); Lewis, 523 U.S. at 846-47, 72 S.Ct. at 1717. "While the measure of what is conscience shocking is no calibrated yard stick, it does . . . 'poin[t] the way.'" Lewis, 523 U.S. at 847, 118 S.Ct. at 1717 (citing Johnson v. Glick, 481 F.2d 1028, 1033 (C.A.2), cert. denied, 414 U.s. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973). In defining what constitutes "conscious shocking" conduct, the Supreme Court held:

> Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.

Betts v. Brady, 316 U.S. 455, 462, 62 S.Ct. 1252, 1256, 86 L.Ed. 1595 (1942).

The totality of the facts of the instant case implicate the vital and original purposes of the Due Process Doctrine to establish those limits on the manner by which government

officers may act in the enforcement of the law. These limits where drastically, arbitrarily, and unjustifiably exceeded by Hoff and Faust in their efforts to stop and aggressively pursue Rico Howard.

The Lewis court held that state officials who engage in high-speed chases with an intent to harm suspects or to worsen their legal plight may be held liable under the Fourteenth Amendment; however, subject to a standard of review more strict than "deliberate indifference". Lewis at 853-854, 118 S.Ct. at 1720. This heightened standard of "intent to harm or worsen legal plight" has been applied by courts only in those cases where the officer has engaged in a high-speed pursuit in relation to the "legitimate object of arrest". Id. at 834; Feist v. Simonson, 222 F.3d 455, 464 (8th Cir.2000); Helseth v. Burch, 258 F.3d 867 (8th Cir. 2002); Trigalet v. City of Tulsa, 239 F.3d 1150 (10th Cir. 2001); Onossian v. Block, 175 F.3d 1169 (9th Cir. 1999); Davis v. Township of Hillside, 190 F.3d 167 (3rd Cir. 1999).

B. The Eighth Circuit Misinterpreted Both the "Intent to Harm/Worsen Legal Plight" Standard and the Holding in Checki v. Webb.

The instant case is analogous to that of Checki v. Webb, 785 F.2d 534, 538 (C.A.5 1986). In Checki, innocent plaintiffs who had engaged in no illegal activity, were wrongly pursued by police officers, and were caused harm as a result of the officers' unjustified continued pursuit of their vehicle. Id. The plaintiffs drove at speeds in excess of 100 miles per hour in an effort to evade the officers' attempts to apprehend them, even after they learned the pursuers were police officers. Id. The Checki Court found that the Plaintiffs acted appropriately in drastically exceeding speed

limits in an effort to evade the police officers who unjustifiably initiated and continued efforts to stop them.

The Eighth Circuit's decision relative to the instant matter directly conflicts with the undisputable logic of Checki. Judge Lokan's opinion states:

> Appellee's argue that officers Hoff and Faust evidenced the requisite intent to harm in pursuing Howard because they did not have probable cause to stop him and therefore the pursuit was unrelated to the legitimate object of arrest. This contention is without merit. When Howard refused to stop after the officers activated their emergency lights, they had probable cause to arrest him for committing a felony in their presence, regardless of their initial reasons for the attempted stop. Thus, the pursuit was "aimed at apprehending a suspected offender" and did not objectively evidence "a purpose to cause harm unrelated to the legitimate object of arrest." *Lewis*, 523 U.S. at 836, 118 S.Ct. 1708.

App. 24.

The Eighth Circuit's holding explicitly finds that an officer's effort to pursue an individual is legitimate whenever that individual refuses to stop after an officer attempts to detain him. Such a holding would serve to "legitimize" every high-speed pursuit and render meaningless the Lewis court's requirement that all high-speed pursuits be related to the "legitimate object of arrest."

Checki was specifically cited by the Lewis Court as "an example of intent to cause harm unrelated to the legitimate object of an arrest." Helseth, 258 F.3d at 872 (citing Lewis, 523 U.S. at 854, n. 13, 118 S.Ct. 1708. Consequently, in cases of pursuits which are not the "legitimate object of arrest", the mere fact that the automobile being pursued may drastically exceed speed limits in an effort to elude the wrongful police pursuit not legitimize the officers pursuit and render it "related to the legitimate object of arrest". Pursuant to the reasoning of the Eighth Circuit in the instant matter, every high-speed pursuit by its very nature would be viewed as in furtherance of the "legitimate object of arrest". Such reasoning would eviscerate the requirement in Lewis that only those high-speed which are "related to the legitimate object of arrest" are subject to the heightened "intent to harm/worsen legal plight" standard.

Contrary to the holding of the Eighth Circuit in the instant matter, Checki (as cited by Lewis) is a specific example of the logical premise that simply trying to evade police officers engaged in an illegitimate effort to stop an automobile, even if such efforts involve excessive speeds, does not legitimize the pursuit at issue.

With regard to the "worsen legal plight" standard articulated in Lewis, the Eighth Circuit further held:

> The Court added this term the second time it stated its intent-to-harm holding in Lewis. Compare 523 U.S. at 836, 118 S.Ct. 1708, with 523 U.S. at 854, 118 S.Ct. 1708. The Court did not further explain what it meant by an intent to worsen legal plight, but the sentence was followed by footnote 13, which discussed a prior Fifth Circuit case involving

> alleged "intentional misuse" of a police officer's vehicle to terrorize a citizen. Checki v. Webb, 785 F.2d 534, 538 (5th Cir.1986). ... [W]e construe the term as applying only to a narrow category of pursuits that reflect a conscience-shocking motive beyond the realm of legitimate government action but do not involve an intent to inflict physical harm.

App. 24-25. Petitioners respectfully assert that the officers' pursuit of a law-abiding Howard in the instant case constitutes the textbook example of that situation addressed in the Eighth Circuit's interpretation of Checki as cited in Lewis – a pursuit which "reflects a conscience shocking motive beyond the realm of legitimate government action but do not involve an intent to inflict physical harm."

The facts of the instant dispute indicate that Hoff and Faust had no reasonable belief that they possessed a justifiable reason to attempt to stop Rico Howard. The fact that Hoff and Faust based their attempted stop and pursuit on the fact that they remembered only that a "Howard" was identified on a PC pickup simply does not legally justify their efforts to stop, let alone pursue Rico Howard in a prolonged manner. It is undisputed that at the time Hoff and Faust chose to stop Rico Howard, and until the wrongfully initiated pursuit at issue, Mr. Howard had engaged in absolutely no unlawful activity of any type, or any other conduct justifying Hoff's and Faust's efforts to stop and pursue him. The "high-speed" pursuit of Rico Howard by Hoff and Faust served in no manner the "legitimate object of arrest" as required by the Lewis analysis. Consequently, Hoff and Faust are not entitled to qualified immunity.

C. Hoff and Faust unjustifiably attempted to harm Rico Howard and worsen his legal plight.

While Slusarchuk and Stebleton argue that evaluation of Hoff's and Faust's unlawful conduct in engaging in a stop and slow-speed pursuit of Rico Howard is subject to the "deliberate indifference" standard, Slusarchuk and Stebleton further allege in the alternative that Hoff and Faust engaged in affirmative conduct intended to harm and "worsen the legal plight" of Rico Howard - conduct which, pursuant to the Lewis standard, "shocks the conscience of society."

It is undisputed that Rico Howard had a prior history with Faust. It is also undisputed that Hoff and Faust claim they decided to apprehend Mr. Howard based solely upon the "Howard" PC pickup at issue - despite the fact that Rico Howard had engaged in no illegal conduct. Faust and Hoff chose to stop and pursue Mr. Howard solely because he shared the same last name as an individual identified in a PC pickup and, as a result, could conceivably be the same person as that identified in the PC pickup.

Stebleton and Slusarchuk allege that Hoff and Faust made their unjustified decision to stop Rico Howard in order to harass him and in the hope that they could locate or entice some form of illegal activity. Mr. Howard initially ignored Hoff and Faust's unjustified efforts to approach him, as was his legal right. See Florida v. Royer, 460 U.S. 491, 498 (1983) (when an officer approaches an individual without reasonable suspicion, that individual has a right to ignore police and go about his business). Consequently, Hoff and Faust continued to prod Mr. Howard as he attempted to protect himself from Hoff's and Faust's efforts by driving within normal speed limits, but refusing to pull over. Ultimately, Faust and Hoff's antagonizing foreseeably

resulted in a high-speed pursuit and acceleration of their cars to dangerous speeds by both Rico Howard and Hoff.

Hoff and Faust were certainly aware based upon their significant law enforcement experience that when Mr. Howard continued his refusal to stop and continued to drive at slower speeds, he may well ultimately exceed the speed limit and break other laws in an effort to elude the officers and avoid the improper stop. Given the fact that Hoff and Faust knew or should have known that their attempted stop and pursuit of Howard was unjustified, they wrongfully attempted to worsen Howard's legal plight by insisting on continuing their baseless harassment and pursuit of Howard. This type of improper harassment and prodding of an innocent individual after it is clear he is unwilling to accommodate Hoff's and Faust's efforts to conduct an improper stop is precisely the type of wrongful behavior by state officials which Lewis prohibits.

While officers are engaged in lawful efforts for the protection of legitimate societal interests, those officers are generally entitled to qualified immunity relative to their actions. When such officers act in a racially-motivated manner, claiming entitlement to stop and pursue an African-American individual solely because he is unfortunate enough to possess the same last name of an individual wanted for probable cause pickup, such conduct is unlawful and certainly unworthy of the protections offered honest public servants engaged in the good-faith exercise of their duties.

Hoff and Faust are not entitled qualified immunity protection relative to their blatantly unjustified and unlawful conduct which harms not only the targeted individual, but also innocent third parties – in this case Michael Slusarchuk and Jennifer Stebleton. Hoff's and Faust's conduct is made all the more egregious by the fact that they had substantial

time to deliberate upon their conduct, were not suddenly confronted with illegal conduct requiring instantaneous response, and continually harassed and provoked Mr. Howard until, out of fear, Rico Howard made a final desperate attempt to escape Hoff and Faust's aggression. Hoff and Faust ignored and acted in defiance of repeated opportunities to "do better" by ceasing their unjustified efforts to stop and pursue Rico Howard. Hoff and Faust's conduct certainly constitutes behavior intended to worsen Rico Howard's legal plight in a manner which "shocks the conscience."

Officers are undeniably offered certain protection for reasonable, but mistaken beliefs as to facts establishing probable cause. Saucier v. Katz, 533 U.S. 194 (2001). Contrary to the specific claims in Appellants' Brief, however, in no manner did Faust or Hoff possess a mistaken belief relative to the "Howard" PC pickup. In none of their sworn testimony to date do Hoff and Faust assert that they at any time believed Rico Howard was, in fact, the individual identified in the PC pickup or that they made any mistake relative to that issue. To the contrary, Hoff and Faust are absolutely unequivocal in their testimony that they recalled only the last name "Howard" and proceeded in their efforts to detain Rico Howard based on the possibility that Rico Howard was the individual identified in the PC pickup. (A-319).

Importantly, Hoff and Faust wrongfully attempted to stop Mr. Howard not based on a belief he was, in fact, subject to a PC pickup, but based upon the remote possibility that he may be the same man as the African-american identified as "Howard" on the PC pickup. No mistake was made by Faust or Hoff.

It is as a direct causal result of Hoff and Faust's unlawful and illegitimate decisions to attempt to stop and to pursue Rico Howard that Jennifer Stebleton was killed and Michael Slusarchuk was rendered paraplegic. Hoff and Faust acted in deliberate disregard to the constitutional rights of Rico Howard and Petitioners in causing such damages.

The Supreme Court has found that in the event the actions of the State contribute to a causal chain resulting in loss of life, liberty, or property, then a substantive due process right is implicated. See Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 118 S.Ct. 1244, 140 L.Ed.2d 387 (1998) (affirming that an inmate under sentence of death maintains a residual 14th amendment life interest); Lewis, 523 U.S. at 856, 118 S.Ct. at 1722 (Concurrence of Justices Kennedy and O'Connor) ("The actions of the State were part of a causal chain resulting in the undoubted loss of life. We have no definitional problem, then, in determining whether there is an interest sufficient to invoke due process"); see also Freeman v. Ferguson, 911 F.2d 52, 54 (8th Cir.1990) (affirmative act by a state actor to interfere with the protective services which would have otherwise been available in the community raised 14th amendment question); Wood v. Ostrander, 879 F.2d 583, 589-590 (9th Cir.1989), cert. denied, 498 U.S. 938, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990) (officer's conduct of arresting driver of a vehicle, impounding his vehicle, leaving the passenger stranded following which the passenger was ultimately raped raised a question as to whether the officer affirmatively placed the claimant in a position of danger, depriving her of a liberty interest); Cornelius v. Town of Highland Lake, 880 F.2d 348 (11th Cir.1989), cert. denied, 494 U.S. 1066, 110 S.Ct. 1784, 108 L.Ed.2d 785 (1990) (14th amendment right to be protected from harm arose from the state action of establishing a community work squad containing prison inmates).

Slusarchuk and Jennifer Stebleton were injured as a direct result of Hoff and Faust's legally unjustified and outrageous conduct. When Hoff and Faust chose to attempt to stop Rico Howard, and later pursue him through residential Minneapolis, without even remote justification, Hoff and Faust knowingly engaged in conduct which they knew based upon their professional experience could endanger the life, liberty and property of both Mr. Howard and innocent third parties. Despite this knowledge, and in deliberate disregard to the constitutional substantive due process rights of Slusarchuk and Stebleton and Rico Howard, Hoff and Faust engaged in a pattern of behavior which "shocks the conscience" – conduct which is condemned in virtually every regard by the previously identified City of Minneapolis policy regarding initiation and continuation of pursuits. These wrongful, unjustified and shocking actions of Faust and Hoff fortunately resulted in no physical harm to them, but have directly and tragically resulted in the death of Jennifer Stebleton, and the permanent quadriplegia of Michael Slusarchuk.

CONCLUSION

For the reasons stated above, the well-defined law of the Court as identified in Lewis and public policy mandate that officers not be immune from their own wrongful conduct in initiating high-speed pursuits which are not related to the "legitimate object of arrest" and which are rather predicated upon an "intent to cause harm or worsen legal plight."

Petitioners Michael Slusarchuk and Elaine Stebleton respectfully assert that the Court should grant the Petition for a Writ of Certiorari and reverse the decision of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Michael SLUSARCHUK,
Plaintiff,

v.

John HOFF, individually and in his official capacity as Minneapolis Police, Officer Lance Faust, individually and in his official capacity as Minneapolis Police Officer, and the City of Minneapolis,
Defendants,

Civil File No. 01-1405

MEMORANDUM AND ORDER

and

Elaine Stebleton, individually and as trustee on behalf of the heirs and next of kin of Jennifer Stebleton, deceased,
Plaintiff,

v.

John HOFF, individually and in his official capacity as Minneapolis Police, Officer, Lance Faust, individually and in his official capacity as Minneapolis Police Officer, and the City of Minneapolis,
Defendants,

Civil File No. 01-1406

Filed: 10-31-02
Richard D. Sletten, Clerk

This matter is before the Court on Defendants' Motion for Summary Judgment. For the reasons that follow, the Court grants in part and denies in part Defendants' motion.

BACKGROUND

At approximately 11:30 p.m. on August 22, 2000, Minneapolis Police Officers John Hoff ("Hoff") and Lance Faust ("Faust") of the Third Precinct were on patrol in a marked squad car. Hoff was driving, and the officers were traveling east on 44th Street South in a residential area of Minneapolis. As they approached 4th Avenue South, the officers observed a black Mitsubishi stopped legally on 4th Avenue, facing south. Officer Hoff stopped at the four-way stop sign at the intersection of 44th Street and 4th Avenue. The Mitsubishi did not move for several seconds. The officers turned north onto 4th Avenue and drove past the Mitsubishi. Hoff shined the squad car's alley light into the Mitsubishi to observe the driver. As to what he observed, Hoff testified as follows:

Q And did you see if there was anyone in the car?
A Yes, I did.
Q Was there one person?
A It was a black male sitting--- sitting in the driver's seat.
Q Did you recognize that person?
A I didn't, no.
Q Did Officer Faust indicate to you he recognized that person?
A Officer Faust said that he thought it was Rico Howard.

(*See* Ginder Aff., Ex. C, *State of Minnesota v. Rico Patrick Howard,* Hennepin County Ct. Dist. File No. 00080738, Tr. of Officer Hoff at Rasmussen Hr'g., 10-11.)

Officers Hoff and Faust assert that they then discussed an outstanding probable cause pickup ("PC pickup") on an individual named "Howard." Hoff testified:

> As I turned, I shined the light on him. Turned slowly, as I proceeded slowly with the light, Officer Faust said that he believed that was Rico Howard. And then I said to him, I said, "Officer Faust isn't there a pick-up on a Howard, a PC pickup?" Which we--it's a PC at roll call. And we believed that, yeah, it was the Rico Howard.

(*Id.* at 11.) Rico Howard is a 46-year old black male. Faust claims that he recognized Rico Howard from previous police dealings. Faust also believed that the "Howard" pickup was from earlier that day. (*See* Ginder Aff., Ex. C, *State of Minnesota v. Rico Patrick Howard,* Hennepin County Ct. Dist. File No. 00080738, Tr. of Officer Faust at Rasmussen Hr'g., 41, 56.) Nevertheless, the police officers agree that they did not recall any details about the pickup. Faust states:

> Q And at that time you just remembered the name Howard?
>
> A Just remembered the name Howard. I remembered there was a Howard on a pickup at roll call.

(*Id.* at 40.) Hoff states, "I just remembered the last name Howard." (Hoff Test. at 34.)

It is undisputed that there was no PC pickup issued the morning of August 22, 2000. In fact, there was no PC pickup issued on a "Howard" in the month of August. Rather, a PC pickup had been issued on July 25, 2000, on a LeRon Lee Howard. That PC pickup included two large photographs of LeRon Lee Howard and identified him as a 26-year old black male residing at 818 Washburn Avenue North, well outside Officer Faust's and Officer Hoff's precinct. It is also undisputed that neither officer attempted to verify any pickup.

Faust testifies further:

> Q And then at some point, did you and Officer Hoff made (sic) a determination to make an investigatory stop of the defendant?
>
> A We didn't verbally, but we kinda--- when we discussed, after passing him on 4th Avenue there, just kinda after working with him for awhile we kinda knew we were going to stop him.
>
> Q And what were the reasons you were going to stop him? What was the basis for the stop?
>
> A Well, it was kinda suspicious behavior that he's sitting at a stop sign.
>
> . . .

(Faust Test. at 44-45). Officer Faust offers various reasons for suspicion, ranging from possible intoxication or medical problems to the fact that Rico Howard did not look at the officers when they passed and shined the alley light at him. (*Id.*)

Officer Hoff, recalling the decision to stop Rico Howard differently, offers yet another reason for the stop, asserting that this was when he *verbally* told Officer Faust that he was going to pull over Rico Howard:

> Q As you went northbound on 4th Avenue, did you see what, if anything, the defendant did in his vehicle?
>
> A I just watched him in my rearview mirror as Officer Faust and I talked about who it was. And then we decided--- he made a left-hand turn from 4th Avenue onto 44th Street to go east and he didn't signal, he just turned. I told Officer Faust, you know, I'm going to go pull this guy over.

(Hoff. Test. at 14). Nevertheless, neither police report indicates that Rico Howard failed to signal a left turn and that this was the basis for the stop. Moreover, Faust denied any verbalization of an agreement to stop Rico Howard: "We made the decision to pull him over after we passed him. It's-- we didn't verbalize and say, we're going to stop him." (Faust Test. at 58.)

Notwithstanding the officers' testimony, the only basis articulated in both police reports for stopping Rico Howard was that the officers recalled a PC Pickup on "a Howard." In fact, Hoff noted with surprising specificity in his report, which nearly mirrors Faust's, that they were aware of a PC Pickup on a Howard for "Aggravated Assault."

Nevertheless, the officers did not turn around or otherwise attempt to stop Rico Howard at that time. Rico Howard had turned left and was traveling eastbound on 44th

Street. The officers continued traveling northbound on 4th Avenue, away from Rico Howard's vehicle, allowing Rico Howard to drive out of sight. The officers then turned right to travel eastbound on 44th Street. Officer Hoff claims that he intended to circle around the block to follow Rico Howard. However, Rico Howard, as if by chance, turned left to travel northbound on 5th Avenue and met the officers again at the intersection of 43rd Street and 5th Avenue. Rico Howard stopped at the intersection and then proceeded through the stop sign. The officers then turned left onto 5th Avenue to travel northbound behind Rico Howard. About mid-block between 43rd Street and 42nd Street, the officers activated their emergency lights and Officer Faust radioed police dispatch of the traffic stop. Rico Howard pulled over to the curb and slowed down but did not stop his car.

Rico Howard then went through the stop sign at 42nd Street and 5th Avenue, and turned left, westbound, onto 42nd Street. The officers followed, activating their siren. Rico Howard continued westbound, and went through a four-way stop at 42nd Street and 4th Avenue. At this point, the parties were traveling at low rates of speed at or below the speed limit. Officer Hoff estimated the speed at 10 to 20 miles per hour. Rico Howard again appeared to pull over to the curb, but continued driving. Rico Howard went through the next four-way stop at 42nd Street and 3rd Avenue without stopping, and turned left onto 3rd Avenue. The chase continued along 3rd Avenue. The officers contend that they were traveling three-fourths of a block behind Rico Howard at a rate of 15 to 20 miles per hour. The officers contend that within the 4400 block of 3rd Avenue, Rico Howard began to gain speed and pull away from their vehicle. However, a resident living at 44th Street and 3rd Avenue who had been sitting outside on his porch during the chase and saw the vehicles approaching from 43rd Street indicated that the speed of the two vehicles appeared constant, the

vehicles were traveling an estimated 50 to 60 miles per hour, and the police vehicle was approximately 20 feet behind Rico Howard's vehicle. (Wandling Aff., Tulua Nuuvali Aff. ¶ ¶ 1-6.)

The officers continued to chase Rico Howard toward the intersection of 3rd Avenue and 46th Street in the residential neighborhood. Meanwhile, Jennifer Stebleton and Michael Slusarchuk, traveling eastbound on 46th Street in their vehicle, drove into the path of the high-speed chase. Stebleton, who was driving, had the right of way. Rico Howard, however, drove through the stop sign at the intersection and struck Stebleton's vehicle.

Stebleton was killed instantly by the impact. She was pronounced dead at the crash site. Slusarchuk, as passenger, was trapped and paralyzed, suffering multiple internal and external injuries. Specifically, Slusarchuk suffered a mitral valve injury, a spinal cord injury, and multiple fractures of his right arm. (*See* Wandling Aff., Ex. G, Hennepin County Medical Center, Operation Report, August 23, 2000.) Slusarchuk underwent C6-C7 cervical discectomy and fusion. (*See* Wandling Aff., Ex. H, Hennepin County Medical Center, Operation Report, August 26, 2000.) After the collision, Slusarchuk was in critical condition and comatose for weeks. He nearly died on several occasions, and endured numerous surgeries to repair his spine, heart, and broken bones. As a result of the collision, Slusarchuk is quadriplegic and will require the use of a wheelchair for the remainder of his life.

Sergeant John Dennig ("Dennig") of the Minnesota State Patrol prepared the crash reconstruction. Dennig determined that Rico Howard was traveling 68-76 miles per hour immediately prior to the collision and had not applied his brakes. Dennig determined that Stebleton had been

traveling 24-26 miles per hour immediately prior to the collision and was not at fault for the collision.

Officer Faust completed a police report of the incident at 2:05 a.m. on August 23, 2000. That report provides, in pertinent part:

> Pursuant to Dept. Policy and Procedure I am giving the following statement. While working squad 334 with my partner, Officer HOFF, we were on routine patrol in a marked Police squad car. We were traveling EB on 44th St approaching 4th Ave. Officer HOFF, who was driving, stopped at the stop sign which is a 4-way stop. There was a vehicle on 4th Ave facing SB stopped at the stop sign at 42nd St. This vehicle sat there for several seconds. Officer HOFF drove into the intersection then turned NB on 4th Ave and drove slowly past this vehicle. There was one black male occupant that I recognized as RICO HOWARD. Once I recognized this individual I turned to Officer HOFF and stated that the driver of the vehicle was RICO HOWARD. I recalled from roll call that there was a PC Pick Up on a HOWARD. I believed this PC Pick Up was on RICO HOWARD. It should be noted that I recognized HOWARD because I have had several contacts with him throughout my career.
>
> Officer HOFF turned EB on 43rd St where he met up with HOWARD driving MN license 273-PBS NB on 5th Ave at this point. Officer HOFF followed this vehicle north on

5th Ave. Shortly before 42nd St, Officer HOFF activated the overhead lights to initiate a traffic stop. I called out over the radio that we were stopping this vehicle at 42nd St and 5th Ave. After radioing dispatch this information HOWARD driving slowly continued to 42nd St. He turned WB on 42nd St and continued driving slowly and not stopping. Officer HOFF at this point activated the siren and I radioed dispatch that this vehicle was not pulling over and that he was driving west on 42nd St. As we approached 4th Ave S, the vehicle slowed down but did not come to a complete stop for the stop sign. The vehicle continued west on 42nd St to 3rd Ave S where it slowed again for the stop sign but did not come to a complete stop. The vehicle then turned SB on 3rd Ave. I radioed dispatch that the vehicle had turned south on 3rd Ave. S. We continued following the vehicle with our lights and siren. Officer HOFF was following the vehicle approximately a quarter of a block behind. I radioed dispatch that the vehicle was continuing SB on 3rd and that it was occupied by one black male. As the vehicle approached 45th St it began to pick up speed. At this point I believed the suspect was attempting to flee officers. Before I could air anymore information the vehicle traveling very fast at this point went through the stop sign at 46th St and 3rd Ave S and struck another vehicle which was traveling east on 46th St. When the suspect vehicle struck the other vehicle I did not see any brake lights flashing on the suspect vehicle. I did see his

taillights but did not see any brake lights being activated. When the accident happened we were approximately 3/4 of a block away. Officer HOFF then sped up to get to the accident scene to render aid as I called out over the radio that we needed Rescue and Ambulance Code 3 for an accident.

Officer Hoff completed a police report of the incident at 2:35 a.m. on August 23, 2000. That report provides:

Pursuant to Dept. Policy and Procedure I am giving the following statement. While worked Squad 334 with my partner, Officer FAUST, we were on routine patrol in a marked Police car. We were traveling EB on 44th St approaching 4th Ave. I was driving the squad and I observed a vehicle sitting on 4th Ave at 44th St facing SB. This intersection is a 4-way stop. I approached the intersection and came to a complete stop waiting for that vehicle to proceed through the intersection. This vehicle did not move so I made a left hand turn to go NB on 4th Ave. As I passed that vehicle I turned on my driver's side alley light and it shined on the driver of that vehicle to see if there was a problem in the car. There was a black male occupant sitting in the driver's seat and Officer FAUST stated that the driver was RICO HOWARD. We were aware that there was a PC Pick Up on a HOWARD for Aggravated Assault and we believed that the PC Pick Up was for Rico Howard.

We observed the vehicle to make a left hand turn and go EB on 44th St. I made a right hand turn to go EB on 43rd St. As we approached 43rd St and 5th Ave, the vehicle was coming NB and stopped at 43rd and 5th. I stopped my squad and this vehicle then continued NB on 5th Ave approaching 42nd St. I pulled in behind the vehicle, MN 273-PBS. We were now traveling NB on 5th Ave. Shortly before reaching 42nd St I activated my overhead lights to conduct a traffic stop. Officer FAUST radioed dispatch informing them of the traffic stop. At this point HOWARD was not stopping and turned WB on 42nd St from 5th Ave. I activated my siren in an attempt to get HOWARD to stop the vehicle. HOWARD was still not stopping and traveling slowly. We approached 4th Ave and the vehicle slowed down but did not stop and still proceeded WB on 42nd St. We were traveling at approximately 15 to 20 MPH. The vehicle then proceeded SB on 3rd Ave, still continuing at approximately 15 to 20 MPH and refusing to stop [ ] I continued following with my lights and siren on and was approximately a quarter of a block behind the vehicle. HOWARD continued SB on 3rd and the vehicle approached 45th St it began to speed away from us at a higher rate of speed. At this point, I believed that the suspect was attempting to flee. Before Officer FAUST could air anymore information about the vehicle that was traveling fast it went through a stop sign at 46th St and 3rd Ave and struck another vehicle that was traveling east on 46th St. At the time of the crash we were

> approximately 3/4 block away from it. I did not see the suspect vehicle use his brake lights prior to entering the intersection. When I observed the accident happen, I sped up to the scene so I could see if any medical attention was needed.

On December 4, 2000, Judge Pamela Alexander of the Hennepin County District Court held a Rasmussen Hearing. (*See* Ginder Aff., Ex. C, *State of Minnesota v. Rico Patrick Howard,* Hennepin County Ct. Dist. File No. 00080738, Tr. of Rasmussen Hr'g.) On January 18, 2001, Judge Pamela Alexander concluded that officers had an articulable reasonable suspicion to stop Rico Howard. (Second Ginder Aff., *State of Minnesota v. Rico Patrick Howard,* Hennepin County Ct. Dist. File No. 00080738, Order of January 18, 2001.) On March 6, 2001, Rico Howard pled guilty to Murder in the Second Degree and to Fleeing a Police Officer in a Motor Vehicle Resulting in Great Bodily Harm. (*See* Ginder Aff., *State of Minnesota v. Rico Patrick Howard,* Hennepin County Ct. Dist. File No. 00080738, Guilty Plea Tr. at 3.)

In the underlying Complaints, Plaintiffs allege that Defendants violated their constitutional rights protected by 42 U.S.C. § 1983 by depriving them of liberty without due process of the law, unreasonable seizure, unreasonable interference, unreasonable force, and substantive due process. Plaintiffs also allege a *Monell* claim against the City of Minneapolis. Plaintiffs further allege that Defendants conspired to deprive them of their constitutional rights. Finally, Plaintiffs assert claims of negligence against Defendants. Defendants have moved for summary judgment. Plaintiffs now waive their claims for constitutional violations relating to unreasonable searches and seizures, use of excessive force, and *Monell* liability against the City of

Minneapolis. (*See* Pl. Mem. at 35.) Plaintiffs continue to argue their substantive due process and conspiracy claims. (*Id.*) The Court heard oral argument in the matter on September 20, 2002, at 2:00 p.m., and will address these issues in turn.

DISCUSSION

A. Standard

Summary judgment is proper if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Unigroup, Inc. v. O'Rourke Storage & Transfer Co.*, 980 F.2d 1217, 1219-20 (8th Cir.1992). The nonmoving party must demonstrate the existence of specific facts in the record that create a genuine issue for trial. *See Krenik v. County of Le Sueur*, 47 F.3d 953, 957 (8th Cir.1995). A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Krenik*, 47 F.3d at 957. The Court must view the evidence and the inferences that may be reasonably drawn from the evidence in the light most favorable to the nonmoving party. *See Enter. Bank v. Magna Bank*, 92 F.3d 743, 747 (8th Cir.1996).

B. Qualified Immunity

Defendants have raised the defense of qualified immunity. Qualified immunity is "an entitlement not to stand trial or face the burdens of litigation" and is "an immunity from suit rather than a mere defense to liability."

Saucier v. Katz, 533 U.S. 194, 200, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) (citations omitted). In passing on the qualified immunity defense, a court must determine whether the facts alleged, taken in the light most favorable to the injured party, demonstrate that the officer's conduct violated a constitutional right, and if so, whether that right was clearly established at the time of the events in question. *Id.* at 201, 121 S.Ct. 2151.

1. Constitutional Violations

Plaintiffs argue that Officers Hoff and Faust attempted to stop Rico Howard without justification and engage him in a vehicular pursuit in violation of his Fourteenth Amendment rights. Plaintiffs point to the various inconsistencies in the officers' police reports and testimony to support their position that the officers not only knew that they attempted to pull over Rico Howard without justification, but also that they attempted to cover up this fact. Plaintiffs point to other evidence such as witness affidavits and the crash reconstruction to further demonstrate the inconsistency in the officers' testimony and reports. Plaintiffs argue that the officers were engaged in racial profiling when they decided to stop Rico Howard. Finally, Plaintiffs argue that because the primary constitutional violation upon which they rely involves "the stop" rather than "the pursuit" of Rico Howard, the deliberate indifference standard is appropriate to analyze these claims.

Plaintiffs further argue that Officers Hoff and Faust conspired to deprive Rico Howard of his constitutional rights. Plaintiffs assert that the evidence demonstrates the officers reached a meeting of the minds in their agreement to stop Rico Howard, who was not engaged in any illegal activity. Plaintiffs again point to the officers' police reports, arguing that they "almost exactly mirror each other" and

"misrepresent various aspects of the pursuit of Rico Howard."

Defendants, in turn, argue that under the *Lewis* intent-to-harm standard, the officers did not violate Rico Howard's substantive due process rights. Defendants argue that the officers pursued Rico Howard in a "very short, five or six block chase in order to stop the fleeing Howard vehicle and apprehend Howard." (Def. Mem. at 16.) Defendants further argue that Plaintiffs are estopped from claiming that the officers did not have reasonable suspicion to stop Rico Howard, based on Judge Pamela Alexander's findings in the criminal matter of *State of Minnesota v. Rico Patrick Howard*, Hennepin County Ct. Dist. File No. 00080738, Order of January 18, 2001. Defendants argue that, at any rate, under a totality of circumstances, the officers had a reasonable suspicion to stop Rico Howard. Defendants argue that the officers' version of the facts is largely uncontested, including that Defendant failed to activate his left turn signal. Defendants also dispute that the officers ever admitted to seeing the PC Pickup on the morning of the attempted stop. In short, Defendants argue that Plaintiffs have failed to produce any evidence that the officers had any intent to harm Rico Howard or worsen his legal plight. Defendants argue that even if a constitutional violation were found, it was not clearly established. Finally, Defendants argue that there is no evidence that the officers had an opportunity to meet and discuss their reports before they were prepared, or that they otherwise conspired to violate Rico Howard's constitutional rights.

Fourteenth Amendment

The United States Constitution guarantees that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, sec.

1. The Supreme Court has interpreted this provision to guarantee more than fair process. *Washington v. Glucksberg*, 521 U.S. 702, 719, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). Indeed, the Court has interpreted this provision to govern substantive process as well, "barring certain government actions regardless of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). "The touchstone of due process is protection of the individual against arbitrary action of government." *Dent v. West Virginia*, 129 U.S. 114, 123, 9 S.Ct. 231, 32 L.Ed. 623 (1889). The Due Process Clause was intended to prevent government officials from abusing their power or employing it as an instrument of oppression. *See County of Sacramento v. Lewis*, 523 U.S. 833, 840, 845-6, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (citations omitted). The Supreme Court has recognized as actionable executive abuse of power that "shocks the conscience" or interferes with rights implicit in the concept of ordered liberty. *Id.* at 846, 118 S.Ct. 1708. Official conduct that "shocks the conscience" and violates the "decencies of civilized conduct" offend our notions of due process. *Id.* (citation omitted). The Constitution does not guarantee due care on the part of officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process. *Id.* at 849, 118 S.Ct. 1708. Conversely, conduct intended to injure in some way is unjustifiable by any government interest and is the sort of official action most likely to rise to the conscience-shocking level. *Id.* (citation omitted).

The "shocks the conscience" test is "no calibrated yard stick," but merely "point[s] the way" to what type of conduct the Fourteenth Amendment proscribes. *Id.* at 847, 118 S.Ct. 1708. The Fourteenth Amendment has been said to protect deeply rooted feelings of the community and the fundamental principles of liberty and justice. *See Hebert v.*

Louisiana, 272 U.S. 312, 316, 47 S.Ct. 103, 71 L.Ed. 270 (1926). Indeed, it protects rights basic to our free society. The Fourteenth Amendment protects against the arbitrary restraint of liberty by government officials. *See Hurtado v. California*, 110 U.S. 516, 527, 4 S.Ct. 111, 28 L.Ed. 232 (1884).

Intent-to-Harm/Worsen the Legal Plight Standard

With respect to Plaintiffs' argument concerning the appropriate standard to be applied in this case, the Court agrees with Justice Bye's opinion concurring in part and dissenting in part, that the intent-to-harm/worsen the legal plight standard ill fits the § 1983 claim involved here. *See Helseth v. Burch*, 258 F.3d 867, 876-77 (8th Cir.2001). Nevertheless, we must follow that standard, as the *Helseth* majority was clear. The " 'intent-to-harm' standard of *Lewis* applies to all § 1983 substantive due process claims based upon the conduct of public officials engaged in a high-speed automobile chase aimed at apprehending a suspected offender." *Id.* at 871. The *Lewis* intent-to-harm standard applies regardless of whether a suspect or bystander is hurt. *Id.* "[H]igh speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983." *Lewis*, 523 U.S. at 854, 118 S.Ct. 1708. "[O]nly a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation." *Id.* at 836, 118 S.Ct. 1708.

Lewis involved an officer's high-speed pursuit of a motorcyclist who had already been speeding when the officer encountered him, and ended in the death of the motorcyclist's passenger. *Id.* at 833, 118 S.Ct. 1708. In *Lewis*, the Supreme Court, reversing the Court of Appeals, concluded

that the allegations and evidence were not sufficient to state a substantive due process claim. *Id.* The Court reasoned that Petitioner was faced with "a course of lawless behavior for which the police were not to blame," as the officers had done nothing to cause the high-speed chase in the first place. *Id.* at 855, 118 S.Ct. 1708. The Court determined that the officer's instinct was to do his job as a law enforcement officer, not to induce lawlessness or to terrorize, cause harm, or kill. *Id.* The Court found that there was no reason to believe that Smith's actions were tainted by an improper or malicious motive. *Id.*

Similarly, *Helseth* involved officers' high-speed pursuit of a vehicle traveling 111 miles per hour, which ended with a crash that killed and injured innocent bystanders. *Helseth*, 258 F.3d at 869. One of the injured bystanders filed a § 1983 action against one of the officers involved. Applying the Eighth Circuit's standard in *Feist v. Simonson*, 222 F.3d 455, 464 (8th Cir.2000), the district court denied qualified immunity on the basis that the evidence could support a finding that the officer conducted the pursuit with deliberate indifference to public safety and the plaintiff's rights. Alternatively, applying the *Lewis* standard, the court denied qualified immunity on the basis that the evidence could support a finding that the officer intended to harm the driver and his passengers by engaging in Pursuit Intervention Tactic ("PIT") maneuvers. The Eighth Circuit reversed and remanded, holding that the *Lewis* standard applies to all § 1983 substantive due process claims based on the conduct of public officials engaged in a high-speed automobile chase aimed at apprehending a suspected offender. *Helseth*, 258 at 871. The Court further concluded that there was no violation of the plaintiff's rights under the Due Process clause. *Id.* at 872. The Court reasoned:

> Here, the undisputed evidence is that [the officer] employed the PIT maneuvers in an attempt to stop the fleeing [ ] vehicle and apprehend its driver. The only harm intended by this conduct was incidental to [the officer's] legitimate objective of arresting [the driver]. That intent does not, as a matter of law, establish a substantive due process violation.

Id. With these cases "pointing the way" with respect to the intent-to- harm/worsen the legal plight standard, the Court now turns to the facts of the present case.

When officers encountered Rico Howard, he was stopped legally at a stop sign. This is where the Court's analysis begins. Unlike the "suspected offenders" in *Lewis* and *Helseth,* Rico Howard was not already traveling at high rates of speed or otherwise engaged in unlawful conduct to prompt a response, and the officers were not faced with a "course of lawless behavior" that required police action. Yet, from the moment officers saw him stopped legally at the stop sign to the pursuit that followed, Rico Howard's legal plight worsened. A reasonable jury could conclude that the officers' initial decision to stop a law-abiding Rico Howard amounts to the type of conduct to which the Supreme Court referred when recognizing that a § 1983 action is redressible in situations where an officer intends to worsen a suspect's legal plight. *See Lewis,* 523 U.S. at 854 & n. 13, 118 S.Ct. 1708 (discussing *Checki v. Webb,* 785 F.2d 534 (5th Cir.1986)). Indeed, such conduct would amount to the type of arbitrary government action the Fourteenth Amendment protects against. The Court agrees, as Plaintiffs contend, that such a right was clearly established at the time these events occurred. Accordingly, based on the facts of this case, Plaintiffs, the innocent victims of the high-speed chase,

survive summary judgment on their Fourteenth Amendment claim.

Collateral Estoppel

Finally, Defendants argue that Plaintiffs are collaterally estopped from arguing that the officers had no reasonable articulable suspicion to stop Rico Howard's vehicle, based on Judge Pamela Alexander's findings in the criminal matter of *State of Minnesota v. Rico Patrick Howard,* Hennepin County Ct. Dist. File No. 00080738, Order of January 18, 2001. However, the Eighth Circuit has recognized that collateral estoppel cannot be used to bar a party from litigating an issue decided previously in a criminal proceeding in a subsequent civil proceeding when that party was not in privity with a party to the prior action and did not have an opportunity to fully and fairly litigate the issue in the prior proceeding. *Turpin v. County of Rock,* 262 F.3d 779, 782-83 (8th Cir.2001) (concluding that "[c]ollateral estoppel cannot be used against the officers in our case, as the officers were neither parties nor in privity with the State in the criminal action and did not have a full and fair opportunity to litigate the issues in the criminal action."); *see also Duncan v. Clements,* 744 F.2d 48, 51-52 (8th Cir.1984)(concluding that state court's finding that arrest and search were unconstitutional could not be used offensively against arresting officer in subsequent civil rights suit because interests of State in criminal proceeding were not identical to personal interests of individual officer and, thus, officer was not in privity with State, and officer did not have full and fair opportunity to litigate at suppression hearing as he had no control over State's presentation of its case). Minnesota law on collateral estoppel requires "the *issue* in the current action to be the same issue adjudicated in the earlier proceeding and that the parties subject to estoppel have had a full opportunity to previously litigate the issue." *Gulbranson v. Gulbranson,*

408 N.W.2d 216, 218 (Minn.App.1987)(emphasis in original). Collateral estoppel is appropriate when (1) the issue is identical to the issue in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard in the adjudicated issue. *Carlson v. County of Hennepin*, 428 N.W.2d 453, 457 (Minn.App.1988). In this case, it is fair to say that Plaintiffs were neither in privity with Rico Howard nor given a full and fair opportunity to be heard in the prior criminal matter. Accordingly, collateral estoppel does not apply.

2. Conspiracy to Violate Civil Rights

In order to prove a conspiracy to violate civil rights, a plaintiff must demonstrate that (1) the defendant conspired with others to deprive him or her of a constitutional right; (2) at least one of the alleged co-conspirators engaged in an overt act in furtherance of the conspiracy; (3) the overt act injured the plaintiff; and (4) actual depravation of a constitutional right occurred. *Askew v. Millerd*, 191 F.3d 953, 957 (8th Cir.1999). A plaintiff must demonstrate " 'the defendants had directed themselves toward an unconstitutional action by virtue of a mutual understanding,' and [provide] some facts suggesting such a 'meeting of the minds.' " *Haley v. Dormire*, 845 F.2d 1488, 1490 (8th Cir.1988). Plaintiffs have presented facts that would demonstrate a mutual understanding between the officers. Plaintiffs have presented evidence from which reasonable jurors could conclude that the officers came to a mutual understanding "to initiate a stop of an individual who was not engaged in any illegal or adequately suspicious activity simply because he was African- [A]merican and shared the same last name as an individual identified in a PC pickup." (See Pl. Mem. at 33.) Plaintiffs have presented evidence that the officers' police

reports "almost exactly mirror each other" and "misrepresent various aspects of the pursuit of Rico Howard." (*Id.*) Finally, as previously discussed, Plaintiffs have presented evidence that could establish the underlying substantive due process violation.

CONCLUSION

Accordingly, based on all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Defendants' Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART**;

2. Defendants' motion is **GRANTED** with respect to Plaintiffs' claims for constitutional violations relating to unreasonable searches and seizures, use of excessive force, and *Monell* liability against the City of Minneapolis; and

3. Defendants' motion is **DENIED** with respect to Plaintiffs' substantive due process and conspiracy claims.

Dated: 10-31-02

/s/
Michael J. Davis
United States District Court

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 02-3601

Michael SLUSARCHUK; Elaine Stebleton, individually and as trustee on behalf of he heirs of Jennifer Stebleton,	*	
Plaintiffs--Appellees,	*	Appeal from the United
v.	*	States District Court
	*	for the District of
Jon HOFF; Lance Faust,	*	Minnesota
	*	
Defendants--Appellants.	*	

Submitted: May 14, 2003.

Filed: October 22, 2003.

Before LOKEN, Chief Judge, BRIGHT, Circuit Judge, and SMITH CAMP, [FN1] District Judge.

FN1. The Honorable Laurie Smith Camp, United States District Court Judge for the District of Nebraska, sitting by designation.

LOKEN, Chief Judge.

Rico Howard, fleeing Minneapolis Police Officers Jon Hoff and Lance Faust, ran a stop sign at high speed and struck a car in the intersection, seriously injuring Michael Slusarchuk and killing Jennifer Stebleton. Slusarchuk and Stebleton's heirs filed this § 1983 action against the two police officers and the City of Minneapolis, asserting Fourth Amendment, substantive due process, and conspiracy claims. After defendants moved for summary judgment, plaintiffs abandoned their Fourth Amendment claims and their claims against the City. The district court denied the officers' motion for summary judgment on the substantive due process claims and the related conspiracy claims. *Slusarchuk v. Hoff*, 228 F.Supp.2d 1007, 1018 (D.Minn.2002). Officers Hoff and Faust appeal, arguing they are entitled to qualified immunity. We have jurisdiction over an interlocutory appeal of a qualified immunity denial, but at this summary judgment stage of the proceedings, we must accept as true the facts alleged by the nonmoving parties, appellees Slusarchuk and Stebleton's heirs. *See King v. Beavers*, 148 F.3d 1031, 1032-33 (8th Cir.), *cert. denied*, 525 U.S. 1002, 119 S.Ct. 513, 142 L.Ed.2d 426 (1998). We reverse.

I.

Suspicious of a car lingering at an intersection at 11:30 p.m. on August 22, 2000, officers Hoff and Faust shined an "alley light" into the car. Officer Faust recognized the driver, Rico Howard, and Officer Hoff thought he recalled an outstanding probable cause "pickup" on a man named Howard. The officers followed Howard briefly and then activated their squad car's emergency lights. Howard initially slowed and pulled toward the curb but then drove through a stop sign and continued on at approximately ten to twenty miles per hour. The officers activated their warning

siren, but Howard did not stop. Instead, he ran two more stop signs and then accelerated, with the squad car in pursuit. A witness saw the two cars approach an intersection at fifty to sixty miles per hour. Two blocks later, Howard drove through another stop sign and collided with the car in which Stebleton and Slusarchuk were riding. Howard entered the intersection at about seventy miles per hour and did not brake prior to the collision. Stebleton was killed instantly. Slusarchuk suffered multiple injuries and is confined to a wheelchair for the rest of his life.

Howard pleaded guilty to second degree murder in state court. Slusarchuk and Stebleton's heirs then commenced this § 1983 action. In the district court, officers Hoff and Faust argued they are entitled to qualified immunity under *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998), a police pursuit case in which the Supreme Court held that intent to harm is the applicable substantive due process standard. Plaintiffs argued that the less onerous deliberate indifference standard applies, and alternatively that the officers evidenced the requisite intent to harm when they attempted to stop Howard while lacking probable cause to believe that criminal activity was afoot. The district court denied the officers' motion because "[a] reasonable jury could conclude that the officers' initial decision to stop a law-abiding Rico Howard amounts to the type of conduct to which the Supreme Court referred when recognizing that a § 1983 action is redressible in situations where an officer intends to worsen a suspect's legal plight." 228 F.Supp.2d at 1017.

II.

Qualified immunity shields government officials from damages liability if "their conduct does not violate clearly established statutory or constitutional rights of which a

reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Appellees' legal theory is that officers Hoff and Faust had no probable cause to stop Rico Howard, that they were guilty of racial profiling in attempting a stop, that Howard was legally justified in refusing to stop, that the officers improperly harassed Howard by pursuing him, and that appellees were injured as a "direct result" of this unconstitutional conduct. The theory is framed in Fourth Amendment terms, but as appellees belatedly recognized in the district court, their claims are not covered by the Fourth Amendment because the officers never succeeded in stopping Rico Howard. Pursuit reflecting an intent to stop "does not amount to a 'seizure' within the meaning of the Fourth Amendment." *Lewis,* 523 U.S. at 844, 118 S.Ct. 1708, citing *California v. Hodari D,* 499 U.S. 621, 626, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991). Thus, the qualified immunity issue turns exclusively on whether the officers violated Slusarchuk's and Stebleton's right to substantive due process, as clearly established in *Lewis* and in this court's decisions construing and applying *Lewis.*

A. An initial problem arises because various Supreme Court justices have debated in recent years whether the touchstone of substantive due process liability is conscience-shocking official conduct, *or* conduct that violates a fundamental right deeply rooted in history and implicit in the concept of ordered liberty, *or both. See Lewis,* 523 U.S. at 860-62, 118 S.Ct. 1708 (Scalia, J., concurring). In this case, the district court stated, and appellees argue on appeal, that the proper standard is whether there was an abuse of government power "that 'shocks the conscience' *or* interferes with rights implicit in the concept of ordered liberty." 228 F.Supp.2d at 1015 (emphasis added). That was an error of law. Following *Lewis,* this court sitting en banc held that a substantive due process plaintiff "must

demonstrate *both* that the official's conduct was conscience-shocking, *and* that the official violated one or more fundamental rights that are 'deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.' " *Moran v. Clarke*, 296 F.3d 638, 651 (8th Cir.2002) (en banc) (Bye, J., concurring and writing for a majority on this issue) (citations omitted; emphasis in the original). [FN2]

> FN2. The district court's mistake is perhaps unsurprising. Even a recent panel opinion, *Anderson v. Larson*, 327 F.3d 762, 769 (8th Cir.2003), stated that a substantive due process plaintiff must prove that "a defendant's conduct shocks the conscience *or* interferes with rights implicit in the concept of ordered liberty" (emphasis added; quotation omitted), citing for that principle three Eighth Circuit decisions prior to *Moran v. Clarke*. Judge Bye's opinion for the court en banc in *Moran* is the law of this circuit, not the subsequent panel opinion in *Anderson*.

B. Appellees argued, and the district court agreed, that officers Hoff and Faust would be guilty of conscience-shocking misconduct if a jury found that they attempted to stop Rico Howard based upon his race without probable cause or reasonable suspicion that he was engaged in criminal activity. But this theory is fatally flawed. Appellees lacked standing to assert a § 1983 equal protection claim based upon their racial profiling allegation. *See United States v. Hays*, 515 U.S. 737, 743-44, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995). Similarly, only Howard had standing to raise the Fourth Amendment issue of whether the attempted stop was constitutionally reasonable. [FN3] Slusarchuk and Stebleton were injured because Howard did not stop but fled

at high speed. When Howard refused to stop, he committed a traffic violation and arguably a felony--knowingly fleeing a police officer "acting in the lawful discharge of an official duty." Minn. Stat. § 609.487(3). At that point, the officers clearly had probable cause to pursue, and the subsequent injuries to Slusarchuk and Stebleton resulted from Howard's criminal flight. In these circumstances, those injuries were simply too remote a consequence to permit the imposition of substantive due process liability based upon the officers' initial decision to stop Howard. *See Brower v. County of Inyo,* 489 U.S. 593, 599, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989); *Martinez v. California,* 444 U.S. 277, 285, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980).

> FN3. In the state court criminal proceeding, the court ruled that officers Hoff and Faust had an articulable reasonable suspicion to stop Howard.

C. Thus, the relevant question becomes whether officers Hoff and Faust are entitled to qualified immunity for their pursuit of Howard after he refused to stop. This question turns on the fault standard or level of culpability required to establish conscience-shocking conduct in a § 1983 police pursuit case. In *Lewis,* the Supreme Court held that "in a high-speed automobile chase aimed at apprehending a suspected offender ... only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience." 523 U.S. at 836, 118 S.Ct. 1708. This court sitting en banc subsequently held "that the intent-to-harm standard of *Lewis* applies to all § 1983 substantive due process claims based upon the conduct of public officials engaged in a high-speed automobile chase aimed at apprehending a suspected offender." *Helseth v. Burch,* 258 F.3d 867, 871 (8th

Cir.2001) (en banc), *cert. denied*, 534 U.S. 1115, 122 S.Ct. 924, 151 L.Ed.2d 888 (2002).

Despite this settled law, appellees argue that the deliberate indifference fault standard applies to their substantive due process claims. They present the very argument we rejected in *Helseth*--that the deliberate indifference standard applies "whenever a judge or jury could say, with the wisdom of hindsight, that an officer engaged in a high-speed pursuit had ample time to deliberate." 258 F.3d at 871 (quotation omitted). As in *Helseth*, we reject this contention. The intent-to-harm standard applies to appellees' claims based upon the officers' pursuit of Howard.

D. Appellees argue that officers Hoff and Faust evidenced the requisite intent to harm in pursuing Howard because they did not have probable cause to stop him and therefore the pursuit was unrelated to a legitimate object of arrest. This contention is without merit. When Howard refused to stop after the officers activated their emergency lights, they had probable cause to arrest him for committing a felony in their presence, regardless of their initial reasons for the attempted stop. Thus, the pursuit was "aimed at apprehending a suspected offender" and did not objectively evidence "a purpose to cause harm unrelated to the legitimate object of arrest." *Lewis*, 523 U.S. at 836, 118 S.Ct. 1708.

Alternatively, appellees argue that the officers are not entitled to qualified immunity because they intended "to worsen [Howard's] legal plight." *Lewis*, 523 U.S. at 854, 118 S.Ct. 1708. The Court added this term the second time it stated its intent-to-harm holding in *Lewis*. *Compare* 523 U.S. at 836, 118 S.Ct. 1708, *with* 523 U.S. at 854, 118 S.Ct. 1708. The Court did not further explain what it meant by an intent to worsen legal plight, but the sentence was followed by footnote 13, which discussed a prior Fifth Circuit case

involving alleged "intentional misuse" of a police officer's vehicle to terrorize a citizen. *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir.1986). We decline to read the term expansively, as appellees urge, because every police pursuit is intended to "worsen [the] legal plight" of the suspect by arresting him. Thus, a broad reading would eviscerate the intent-to-harm standard that the Court adopted, at least in part, to sharply limit substantive due process liability. Rather, we construe the term as applying only to a narrow category of pursuits that reflect a conscience-shocking motive beyond the realm of legitimate government action but do not involve an intent to inflict physical harm. The pursuit in this case reflects no such motive. Therefore, officers Hoff and Faust are entitled to qualified immunity for their conduct in pursuing Howard to arrest him for criminal flight.

E. In Count III of their complaint, appellees allege that officers Hoff and Faust conspired to violate Slusarchuk's and Stebleton's civil rights, including their substantive due process rights. Absent a constitutional violation, "there is no actionable conspiracy claim." *Cook v. Tadros*, 312 F.3d 386, 388 (8th Cir.2002). Accordingly, the officers are also entitled to qualified immunity from appellees' substantive due process conspiracy claims. *See Pfannstiel v. City of Marion*, 918 F.2d 1178, 1188 (5th Cir.1990).

The October 31, 2002 order of the district court is reversed insofar as it denied officers Hoff and Faust qualified immunity from appellees' substantive due process damage claims and their related § 1983 conspiracy claims.

BRIGHT, Circuit Judge, concurring.

In this case a catastrophe occurred. Jennifer Stebleton and Michael Slusarchuk drove into the path of a high-speed

chase. Stebleton died at the scene. Slusarchuk sustained serious injuries, leaving him a paraplegic. Rico Howard, who fled police officers, stands convicted of second degree murder. This chain of events started when two Minneapolis Police Officers, Jon Hoff and Lance Faust, incorrectly believed a probable cause pick-up existed for Rico Howard. At the time officers recognized Howard, he had not committed any crime.

Slusarchuk and Stebleton's heirs sought compensation for alleged violations of their constitutional rights against the police officers. The district court determined that "[a] reasonable jury could conclude that the officers' initial decision to stop a law-abiding Rico Howard amounts to the type of conduct to which the Supreme Court referred when recognizing that a § 1983 action is redressible in situations where an officer intends to worsen a suspect's legal plight." (Add. at 19-20).

Precedent does not support the decision of the district judge. Because in this case under this court's decision, the officers need not explain or account for their actions to Slusarchuk and Stebleton's heirs in federal court. Thus, I add my additional comments to the opinion of the court.

While I join in the opinion, I emphasize Chief Judge Loken's statement in *Helseth v. Burch*, 258 F.3d 867 (8th Cir.2001), that cases of this kind may call for a legislative remedy. *Helseth* addressed another high-speed police pursuit case, resulting in the death of an innocent bystander. Chief Judge Loken wrote: "Society could reasonably decide that an innocent bystander injured during such high-speed police pursuits should be compensated from the public coffers. But that is a legislative decision." *Id.* at 872 (noting that under Minnesota law a police officer has official immunity from claims for injuries resulting from engaging in and continuing

a high-speed pursuit, citing *Pletan v. Gaines*, 494 N.W.2d 38, 41 (Minn.1992)).

High-speed pursuits by police, while sometimes justified by the circumstances, may in many other cases be an unwise police maneuver posing high risk of injury or death to the public as well as participants in the chase. I believe that in cases of improper police conduct in highway motor vehicle chases, state law, not federal law, should provide for an appropriate remedy to innocent victims, such as the victims in this case.

With the above comments, I join in the opinion of this court.

(2)

No. 03-1136

Supreme Court, U.S.
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In The
Supreme Court of the United States

MICHAEL SLUSARCHUK, and ELAINE STEBLETON, Individually and as trustee on behalf of the heirs and next of kin of Jennifer Stebleton, deceased,

Petitioners,

v.

JOHN HOFF, individually and in his official capacity as Minneapolis Police Officer, LANCE FAUST, individually and in his official capacity as Minneapolis Police Officer,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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STATEMENT OF THE CASE

At 11:30 p.m. on August 22, 2000, Minneapolis Police Officers Jon Hoff and Lance Faust were on duty when they became suspicious of a car lingering at an intersection. The officers were a half block away when they first observed the stationary vehicle stopped at an intersection controlled by four-way stop signs. As the officers approached the intersection, the vehicle remained stationary. After the officers reached the intersection, they stopped and waited for the motor vehicle to move. Because the vehicle did not move, Faust became suspicious and wondered if the driver was possibly under the influence of alcohol or had a medical problem.

The officers then made a turn and shined an alley light into the vehicle. Faust recognized the driver, Rico Howard. Hoff thought that he recalled an outstanding probable cause pickup on a man named Howard. The officers followed Howard briefly and then activated their squad car's emergency lights. Howard initially slowed and pulled over to the curb but then drove through a stop sign and continued on at approximately 10 to 20 miles per hour. Howard did not stop, but, instead, drove through two more stop signs and then accelerated with the police in pursuit. The two vehicles reached the speed of approximately 50-60 miles per hour with the squad car behind Howard's vehicle. Within two blocks, Howard went through another stop sign and collided with a car in which Jennifer Stebleton and Michael Slusarchuk were riding. Stebleton was killed instantly. Slusarchuk suffered severe injuries and remains partially paralyzed.

Howard was arrested at the scene. On December 4, 2001, the Minnesota state district court conducted a

pretrial hearing regarding the criminal charges filed against Howard in order to make a pretrial determination of the validity of the stop. The state district court found that the officers had an articulable reasonable suspicion to perform an investigatory stop of Howard. Subsequently, Howard pled guilty to murder in the second degree and to fleeing a police officer in a motor vehicle resulting in great bodily harm.

Slusarchuk and Stebleton's heirs then commenced this action under 42 U.S.C. § 1983. Respondent officers argued in United States District Court that they are entitled to qualified immunity under *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708 (1998), a police pursuit case in which this Court articulated the applicable substantive due process standard. The District Court denied the officers' motion. Respondent officers appealed the District Court's decision. The United States Court of Appeals for the Eighth Circuit reversed the District Court and held that Officers Hoff and Faust are entitled to qualified immunity for the pursuit of Howard after he refused to stop.

RESPONDENTS' REASONS FOR DENYING THE WRIT

Petitioners' fact-bound claim that the Eighth Circuit incorrectly decided this case is plainly incorrect. The decision below is a correct application of clearly-established law of the Supreme Court. Although Petitioners allege a conflict among the circuits, they fail to direct this Court to any relevant cases representing such a split among the lower courts. In fact, the Eighth Circuit opinion

follows this Court's decision in *County of Sacramento v. Lewis*, 578 U.S. 833 118 S.Ct. 1708 (1998), and there is no split among the Circuits in regard to the application of the "shocks the conscience" standard in high speed pursuit cases.

A. Petitioners' claim that a "deliberate indifference" standard should apply in police pursuits is in direct violation of the test articulated by this Court in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998).

In *County of Sacramento v. Lewis*, the Supreme Court resolved the conflict among the circuits over the standard of culpability for officers in pursuit cases in holding that high speed police chases culminating in death or injury to a passenger or bystander are governed by the substantive due process "shocks-the-conscience" test. The Court found that the task in determining the level of culpability in high speed pursuit cases is whether the conduct "is so egregious, so outrageous, that it may be fairly said to shock the contemporary conscience." *Lewis*, 523 U.S. at 847 n.8. Specifically, the Supreme Court held that "in a high-speed automobile chase aimed at apprehending a suspected offender . . . only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation." 523 U.S. 833, 836. The *Lewis* Court specifically rejected the lower fault standard of "deliberate indifference". *Id.* at 852. The Supreme Court restated its holding a second time in the *Lewis* opinion: "we hold that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not

give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983." *Id.* at 854.

Petitioners' argument that the "worsen legal plight" standard of the *Lewis* Court requires a different result is faulty reasoning that not only produces a standard that eviscerates the holding in *Lewis*, but fails to recognize the Supreme Court's other bases for its holding: its historical reluctance "to expand the concept of substantive due process," 523 U.S. at 842; its doubt whether "it makes sense to speak of indifference as deliberate in the case of sudden pursuit," 523 U.S. at 851; its recognition that police officers confronting high-speed lawlessness are "subject to countervailing [law] enforcement considerations," 523 U.S. at 855; its concerns that any standard less than intent-to-harm "might cause suspects to flee more often, increasing accidents of the kind which occurred here," 523 U.S. at 858 (Kennedy, J., concurring); and, the belief of at least some Justices that the question of police officer liability during high-speed pursuits should be decided by the elected branches of government, 523 U.S. at 64-65, (Scalia, J., concurring).

In the instant case, the Eighth Circuit Court of Appeals specifically followed *Lewis* by requiring that Petitioners establish conscience-shocking conduct in a police pursuit and further establish a purpose to cause harm unrelated to the legitimate object of arrest. *Slusarchuk v. Hoff*, 346 F.3d 1178, 1182 (8th Cir. 2003). The Eighth Circuit, following the requirements laid out by the Supreme Court in *Lewis*, rejected Petitioners' argument that the deliberate indifference standard might apply and further rejected Petitioners' contention that Respondent officers did not have probable cause for stopping the fleeing Howard. The Eighth Circuit found no objective

evidence of any kind showing a purpose to cause harm unrelated to the legitimate object of arrest. *Id.* at 1183.

The Eighth Circuit, in rejecting Petitioners' argument that the officers were not entitled to qualified immunity because there was "an intent to worsen legal plight" when they attempted to stop Howard, recognized that such a broad reading would eviscerate the "intent to harm" standard the Supreme Court had adopted. The Eighth Circuit construed the "worsen legal plight" language "as applying only to a narrow category of pursuits that reflect a conscience-shocking motive beyond the realm of legitimate government action but do not involve an intent to inflict physical harm." *Slusarchuk*, 346 F.3d at 1183. The Eighth Circuit's opinion shows that the Court carefully considered, and specifically followed, the guide posts laid out by the Supreme Court in *Lewis* regarding high speed police pursuits.

B. Petitioners fail to identify any conflict among the lower courts on the same matter that would justify the granting of the Petition.

Although Petitioners assert that this Court needs to resolve a split among the circuits with regard to the application of the intent to harm/worsen legal plight standard, Petitioners identify no such split in the circuits. Since *Lewis*, all circuits that have examined the issue have applied the intent-to-harm standard in high speed police pursuit cases without regard to such limiting factors as: the length of pursuit; the officer's training experience; the severity of the suspect's misconduct; the decision to initiate the pursuit; or, the perceived dangers to the public in continuing the pursuit. *See Trigalet v. City of Tulsa*, 239

F.3d 1150, 1155 (10th Cir. 2001); *Davis v. Township of Hillside*, 190 F.3d 167, 170 (3rd Cir. 1999), *cert. denied*, 528 U.S. 1138 (2000); *Onossian v. Block*, 175 F.3d 1169, 1171-72 (9th Cir.), *cert. denied*, 528 U.S. 1004 (1999); *Helseth v. Burch*, 258 F.3d 867 (8th Cir. 2001). The decision of the Eighth Circuit below is in harmony with those circuits, its own prior decisions, and the holding in *Lewis*.

In *Davis v. Township of Hillside*, the plaintiff alleged that, during a high speed pursuit, the defendant officers rammed the pursued vehicle with the patrol car, subsequently injuring the plaintiff, a pedestrian bystander. The Third Circuit rejected plaintiff's attempt to distinguish *Lewis* on the grounds that: (1) the officers were not acting on a report of the commission of a crime; (2) the officers willfully violated police department regulations; and, (3) the officers used deadly force on the pursued vehicle. In rejecting those contentions, the *Hillside* court stated:

> *Lewis* does not permit an inference of intent to harm simply because a chase eventuates in deliberate physical contact causing injury. Rather, it is 'conduct intended to injure in some way *unjustifiable by any governmental interest* [that] is the sort of official action most likely to rise to the conscience-shocking level.' It is not disputed that the ramming occurred in the course of the chase. That physical conduct of some sort between the pursuit and pursuing vehicles might occur in the course of a high speed chase, particularly at its conclusion, is foreseeable. It would undermine *Lewis*' premise to limit liability to conscience-shocking conduct if courts were to segment a high speed chase and examine elements in isolation from each other.

> Here then, as in *Lewis*, the officers were faced with lawless behavior – the flight from their investigation – for which they were not to blame. They had done nothing to cause Cook's high speed driving or his flaunting of their law-enforcement authority. Cook's action was instantaneous and so, by necessity, was the officers' response. Their intent was to do their job as law enforcement officers, not to cause injury.

190 F.3d at 171 (Internal citations omitted; emphasis added).

Similarly, the Ninth Circuit has rejected any attempt to narrow the interpretation of the shock-the-conscience standard as articulated in *Lewis*. In *Onossian v. Block*, 175 F.3d 1169 (9th Cir.), *cert. denied,* 528 U.S. 1004 (1999), motorists who were injured by a pursuing police officer brought a Section 1983 action. The *Onossian* court reviewed the *Lewis* standards and held that once a police officer is justified in giving chase, that justification insulated the officer from constitutional claim, irrespective of who might be harmed or killed as a consequence of the chase. 175 F.3d at 1171. In *Onossian*, the court found that there was no evidence that law enforcement ever intended to cause harm to anyone despite the serious injuries suffered by plaintiffs. The Eighth Circuit has also recognized that the "intent to harm" standard in police pursuit cases applies without regard to the severity of the suspect's misconduct. *Helseth v. Burch*, 258 F.3d 867, 871 (8th Cir. 2001).

Petitioners' contention that Respondent officers had no basis to stop Howard because they were not faced with a "course of lawless behavior" that required immediate police action is unsupported in law. *See, Davis v. Township*

of Hillside, *supra; see also*, the following cases cited in *Lewis*, 523 U.S. at 839; *Evans v. Avery*, 100 F.3d 1033, 1038 (1st Cir. 1996) (applied "shocks-the-conscience" standard where pursuit was initiated after officers cruising through residential neighborhood spotted suspicious activity at an intersection: an individual who appeared to be startled at the presence of officers threw a paper bag through an open window of a parked vehicle, vaulted into the front passenger seat, and the driver immediately drove away at 20 to 25 miles per hour); *Williams v. Denver City*, 99 F.3d 1009, 1015 (10th Cir. 1996) ("shocks-the-conscience" standard applicable where officer was responding to a non-emergency request by another officer to provide backup to that officer on the arrest of a car thief); *Fagin v. Vineland*, 22 F.3d 1296 (3rd Cir. 1994) (en banc) (application of "shock-the-conscience" standard where officer attempted to initiate stop after observing motor vehicle which was not speeding but had a passenger standing up through the car's open T-top roof waving his arms and officer intended merely to warn the driver about the passenger's behavior); *Temkin v. Fredrick County Commissioners*, 945 F.2d 716 (4th Cir. 1991), *cert. denied*, 502 U.S. 1095 (1992) (application of "shock the conscience" standard where deputy sheriff initiated chase with lights and siren after observing a car spinning its wheels leaving a gas station). A review of these cases establishes that law enforcement officers are not required to be confronted with a "course of lawless behavior" before they can initiate police action. Respondents' police action in the present case, based upon articulated suspicions, and indeed, probable cause, simply cannot shock the conscience of contemporary society.

Petitioners rely heavily upon *Checki v. Webb*, 785 F.2d 534 (5th Cir. 1986). That reliance is misplaced. *Checki*, a pre-*Lewis* case, is factually and legally distinguishable from the instant case. Checki, who was a passenger in a private vehicle, brought a claim against police officers who had intentionally exposed him to severe and physical mental harm. The police officers were in plain clothes in an unmarked car and tailgating Checki's vehicle. Checki, who did not know they were police officers, and the driver of his law-abiding vehicle, who had committed no violations of any kind, were then subjected to a high speed chase by the officers for 20 miles before the officers put on red lights and a siren to indicate they were police officers. In *Checki*, there was no claim of any basis to perform an initial stop on the Checki vehicle and there was *intentional misuse* of the officers' vehicle. *County of Sacramento v. Lewis*, 523 U.S. at 854 n.13, 118 S.Ct. 1708. In contrast, in this case, uniformed officers, known as such to Howard, had articulable suspicion to initiate an investigatory stop and probable cause once Howard decided to flee from uniformed officers in a marked squad car.

The case most apposite to the instant case is *Davis v. Township of Hillside*. In that case, New Jersey police officers observed a vehicle "stopped in a traffic lane at a stop sign for what the officers considered an unusually long time. Noting also damage to the car's rear end, the officers decided to investigate . . . " *Hillside*, 190 F.3d at 169. As the officers moved toward the vehicle, it pulled away and a high speed pursuit ensued. *Id.* The *Hillside* court, in rejecting a substantive due process claim, stated "[i]n this case, the officers' suspicions were raised by Cook's unusually long stop at the intersection and rear end damage to the car. Nothing in *Lewis* suggests that courts

are free to second guess a police officer's decision to initiate pursuit of a suspect so long as the officers were acting 'in the service of a legitimate governmental objective,' here, to apprehend one fleeing the police officers' legitimate investigation of suspicious behavior." *Id.* at 170. As the *Hillside* court stated, "the critical factor in determining whether Fourteenth Amendment liability for a high speed chase may be imposed is whether the officer's conduct can be found to shock the conscience, for which the evidence must show intent to harm the suspect physically." The *Hillside* case was cited approvingly by the Eighth Circuit in *Helseth v. Burch*, 258 F.3d at 872.

Respondent officers had substantially more reason to conduct a stop than did the officers in *Hillside*. Respondent officers were investigating a suspicious vehicle when the driver, instead of stopping, feloniously fled from them and caused the grievous injuries suffered by Petitioners. There simply is a complete lack of any evidence that Officers Hoff and Faust had any intent to harm Howard physically, worsen Howard's legal plight in a fashion unrelated to a legitimate government interest, or engage in any conduct that can be deemed conscience-shocking. Because Respondents were engaged in a legitimate governmental objective, Petitioners cannot state a substantive due process violation.

CONCLUSION

For the foregoing reasons, Petitioners' Petition for Writ of Certiorari should be denied.

Dated: March 10, 2004

Respectfully submitted,

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